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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.————————.

GEORGE M. BECHTEL, Executor of the Will of
MARTHA R. BECHTEL, Deceased,
GEORGE M. BECHTEL and HAROLD R. BECHTEL,
Petitioners,

vs.

ILA FAY THATCHER, NANCY ROSSEAU, ELERY SCOTT and STATE OF IOWA, ex rel J. B. Weede.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION.

IN GENERAL.

The separate brief in opposition on behalf of the State of Iowa, ex rel., J. B. Weede requires no separate reply. The suggestion that Chapter 387 of the Iowa Code was enacted to prevent the "watering" of stock of foreign public utility companies in the interest of stockholders is fully met by the finding of the trial court that every share of the stock originally issued by the Iowa Southern Utilities Company of Delaware was fully paid for in money or in property under authority of the Iowa Executive Council. This

insured against any claim of dilution. The corporation received full value in money or property for all the shares representing its capital.

The reclassification effected pursuant to Section 26 of the General Corporation Law of Delaware and the Amendments of the charter of the corporation did not affect the value of the corporations assets, but merely reduced its capital and reclassified its outstanding shares by changing its common stock from 100,000 shares without par value, representing $1,000,000.00 of its capital, into 39,468 shares of common stock with a par value of $15.00 per share, and its 80,000 odd shares of cumulative preferred stock into approximately 320,000 shares of identical common stock with par value of $15.00 each.

Under the Delaware Law as pleaded and proven, the reclassification when approved by the holders of a majority of preferred and common stock, voting separately as classes, *ipso facto* accomplished a transmutation or conversion of the existing shares which was binding upon non-assenting as well as assenting stockholders and was automatically effective (See cases cited in Petitioner's original brief at p. 29 and testimony of Howard Duane, Official Reporter's Transcript pp. 1796-1870, loc. cit. 1852). There was no exchange of stock and no new issue of stock. There was nothing to which any statute contained or incorporated by reference in Chapter 387 of the Code of Iowa was applicable. The corporation admittedly received no new consideration. The stock which had been fully paid for when issued was simply changed pursuant to the contract between the stockholders and no question of dilution with which the laws of public policy of the State of Iowa are claimed to be concerned could possibly arise.

The very separation of the briefs on behalf of the relator and the other respondents is a recognition of the soundness of the position of Petitioners in contending that there

could not have been any issue between the State of Iowa, on the relation of a non-stockholder citizen, and Petitioners, in respect of the fairness of the plan of reclassification as between stockholders.

This reply will not attempt to cover all of the matters urged by the other Respondents as that would require a review of the testimony and the record in such detail that it is doubtful if the reply could be printed and filed in time to receive consideration. Suffice it to say that Petitioners are satisfied that every point can be answered at the proper time and feel that review on the merits should not be denied merely because respondents take issue with them on what the record shows as to the real points involved.

The brief in opposition is almost entirely devoted to the procedural question of the issues below and makes little or no attempt to meet Petitioner's claim that there was a denial of full faith and credit to the laws of Delaware. It sets out three questions, the first and third of which involve what is claimed to have been in issue and voluntarily litigated, and the second of which involves the power of the courts of Iowa to cancel shares of stock of a foreign corporation. The second question, as stated, is based upon at least one utterly false premise, viz, that the stock was issued in violation of the laws of Iowa. If this had been the case there would have been no Petition for Certiorari. Our case is bottomed upon the fact that the undisputed evidence showed, and both the trial court and the Supreme Court of Iowa found, that the common stock issued to the Bechtels was not issued or held in violation of any provision of the Iowa statutes.

The trial court definitely and specifically found that the defendant corporation had not violated the provisions of Chapter 387, except in one respect, which was in failing to report to the Secretary of State certain issuances of *preferred* stock after August 2, 1929. (Concl. of Law, Rec. p. 348,

loc. cit. 349, 350). It found, and the uncontradicted evidence showed, that every share of common stock originally issued to the Bechtels was issued in full compliance with the laws of Iowa and duly reported to the Secretary of State (Findings of Fact m, n, o, Rec. p. 335). It found that on the eve of the reclassification the 100,000 shares of old common stock were valid outstanding shares representing $1,000,000.00 or substantially 11% of the capital of the corporation (Finding of Fact u-l, Rec. p. 340). This being true, it is idle to talk about the power of an Iowa court of equity to cancel shares issued in violation of the Iowa Statutes.

The same question in Respondent's brief, assumes the new common stock to have been *fraudulently* issued and in Point Three (Brief in Opp. p. 17) they seek to justify the failure to restore the *status quo* on the theory that the old common stock was property used to perpetrate a fraud. The pleadings are entirely devoid of any allegations of fraud. We believe that if they are gone over line by line it will be found that the word fraud does not even appear in them. There is no charge of misrepresentation, and any conceivable claim of fraud in the reclassification must, in any event, be limited to constructive fraud, which never calls for the application of the rule contended for by Respondents.

The paragraph of plaintiff's petition referring to the reclassification plan and the invalidity of the old common stock is par. 49 appearing in the Record at page 191. An examination of it will disclose that it does not charge any actual fraud. It alleges that the directors knew that the 100,000 shares of common stock was worthless, and that the corporation had never received anything of value for it. The latter allegation is specifically refuted by the finding that it had been issued for property duly appraised by the Iowa Executive Council (Finding of Fact n, Rec. p. 335).

The authorities cited by Respondents to justify failure to restore the *status quo* will be discussed later in connection with their Point Three.

REPLY TO POINT ONE.

Point One of the Brief in Opposition purports to answer Petitioner's Point 1 and in it Respondents urge the direct opposite of Petitioner's contention by insisting that the decisions below did not go beyond the issues pleaded or voluntarily litigated. Several things urged in it should be commented upon.

First, it appears to be contended that Section 8438 authorizing a suit in equity on behalf of the State confers unlimited powers upon Iowa courts of equity to determine controversies affecting the rights of stockholders. A reading of the statute makes it perfectly clear that the action on behalf of the State must be predicated upon violations of the provisions of Chapter 387 and that it does not purport to confer any authority or jurisdiction to pass upon the validity of stock not issued or held in violation of the provisions of that chapter. A cause of action in equity under that section is the cause of action of the State and not the cause of action of a stockholder or class of stockholders against other stockholders to determine their relative rights.

Respondents say there is no question about the Bechtels holding the new common stock in violation of the provisions of the statute, but the trial court held there had been no violations of the statute and its decree invalidating the shares was predicated upon a finding that the original shares, while valid, had become worthless. If Respondents mean to claim that the new common derived by the Bechtels was void under Chapter 387 because not authorized by the Executive Council a complete answer would seem to be that this was equally true as to all of the

new common derived from the old preferred. None of it was submitted to the Executive Council and if that rendered it void there was no basis for discriminating between the shares received by Petitioners and those received by the other stockholders.

Second, Respondents refer to the Iowa Rules of Civil Procedure relating to joinder of parties and causes of action which they say repealed the prior statutes on the subject, and apparently claim that as these rules went into effect before the trial was commenced, it was proper for the intervening stockholders to join their cause of action based upon unfairness of the plan of reclassification with that of the State for violations of Chapter 387. There are two fallacies in this argument. The first and most obvious is that the question is not what they might have done, but what they did do. The second is that the action was commenced in 1939, three years or more before the rules of civil procedure became effective and the intervenor's pleading, the resistance thereto and their disclaimer of any intention to assert any independent cause of action were all filed before the effective date of the rules. (Rec. pp. 202, 206, 211).

Petitioners referred to the element of misjoinder purely as one argument in support of their contention that the "intervening answer" did not in fact raise an issue as to the validity of their shares, apart from the claim that they had been issued and held in violation of Chapter 387. The fundamental point was that the pleadings tendered no such issue. To support this contention we urged a) that such an interpretation would have resulted in an improper joinder of parties plaintiff and causes of action; and b) that when that point was raised by motion attacking the intervening answer, the intervenor's formally disclaimed any intention to assert any separate cause of action.

When the motion to strike the intervening answer for

misjoinder of parties and causes of action was made in 1940, and when intervenor's resistance was filed January 19, 1943 and when the motion was overruled Jan. 27, 1943 the right of different parties to assert independent causes of action was governed by Code Sections 10960, 10969 and 11130. After July 4, 1943 when these sections were superseded by the Rules of Civil Procedure no change was made in the pleadings of the intervenors, nor did they in any manner thereafter assert that they were now endeavoring to change the interpretation of their pleading and to assert a distinct cause of action.

It is true that the Rules of Civil Procedure were to govern future proceedings in actions commenced before their effective date unless in the opinion of the trial court their application would not be feasible. (Rule 1(b), Iowa Rules of Civil Procedure). However, this provision cannot have the effect of working a change in the issues merely because after the rules became effective such issues might have been permissible.

Again, we repeat, the question is whether intervenors did plead, or they and the present Petitioners did voluntarily litigate, any claim that in the absence of any violations of Chapter 387, the new common stock derived from the old common was void as between stockholders. The fact that the joinder of such a cause of action with that of the State would have constituted a misjoinder and would not have been proper under the then controlling statutes afforded a cogent reason for concluding that no such cause of action was being asserted. Still more cogent is the fact that when the corporate defendant charged that the "intervening answer" gave rise to such a misjoinder the intervenors disclaimed any such purpose and by their own interpretation limited their claim to joining with the plaintiff for relief authorized only under Chapter 387.

The Wisconsin case of *Luther v. C. J. Luther Co.* was

not cited as controlling on the interpretation of the Iowa Rules of Procedure, but because it illustrates first, the situation regarding misjoinder as it existed under the Iowa statutes in force when this pleading was filed and interpreted, and, second, the situation regarding voluntary litigation.

Respondents say that the intervenors did not disclaim any of their rights, but prayed that all illegally issued stock be decreed void. Petitioners are not claiming any waiver of any rights intervenors might have had, but do contend that they disclaimed any intention to assert them in this action. The nature of their disclaimer is set forth in detail in Division I of the original argument of the Bechtels as appellants (Rec. pp. 418-421). It is absolutely unequivocal. They followed that disclaimer with a failure to appear at the trial either in person or by counsel. They offered no evidence and they were entitled to no decree that any shares were invalid unless the State had been able to establish that they were issued or held in violation of the provisions of Chapter 387.

REPLY TO POINT TWO.

This is asserted to be in answer to Point 1 of Petitioner's brief, but it actually evades the point by injecting the claim that the shares declared void were issued in violation of the laws of Iowa, which the findings of the court expressly negative, and claims of constructive fraud and want of consideration which certainly were not in issue. In arguing this Point Respondents make their only reference to the laws of Delaware.

As we said at the outset, the Petition for Certiorari does not present any question of the power of an Iowa court of equity to cancel stock issued in violation of the laws of Iowa. The question is as to its power, under the issues joined before it, to review the fairness of a reclassification

of the shares of a Delaware corporation and to cancel shares into which admittedly valid shares were transmuted, merely because of a capital impairment.

We need not repeat that the trial court found no violation of the Iowa statutes in the issuance of the common stock so its decree invalidating the shares into which Petitioners' common stock was transmuted, was based, not upon any ascertained violation of the statutes of Iowa, but upon principles of equity generally, and its conclusion that the plan was unfair to the old preferred shareholders because it permitted common stock over which their shares had priority on liquidation, to participate.

There was no issue of fraud, either actual or constructive, before the court. In the case at bar no allegation was made of any misrepresentation by the common stockholder in procuring the adoption of the plan. This and other elements of a stockholders' derivative suit were the subject of another action to which the trial court made frequent reference. For example, during the proceedings in connection with the production of books and papers the Court made the following statement:

> "THE COURT: A question of information, the court can't be entirely ignorant of what is going. I noticed in the D. Moines Register Sunday, I bring it up because it is important, there is another suit filed by the same counsel apparently involving receivership and a good many questions that are in this case, and I bring it up frankly because I saw it, and I am wondering if that suit displaces this, or whether we are going to go on with this suit, as a matter of fact has another suit been filed, who filed it, what is involved, because I want to find out where I am going, what issues are involved in that suit and what in this, whether you are trying to get information in this suit to help this suit out." (Trans. on Applic. for Production p. 95)

"MR. ONTJES: This is not information for that lawsuit, this lawsuit as it now stands, as it now stands, the rule of the court has been here, the matter of whether or not these officers took the money from the stockholders of course is going to be presented to the court sometime; now those things as I understand the court's prior ruling to which we did take exception, the court ruled against the matters of evidence relating to the fraud as we say they perpetrated on the stockholders.

"THE COURT: I think the record would show that you filed an amendment setting up those issues, and then voluntarily withdrew it, and after you withdrew it said those issues were no longer in the case, now I think that is it, we can't go outside for something that Mr. Ontjes wants to prove about this million nine hundred thousand, I will sustain the objection in this case it is not an equitable proceeding, if you want to make some offer, this is a return as to why he did not produce some papers. Plaintiff excepts." (Trans. on Applic. for Prod. p. 96).

At page 121 of the Transcript of proceedings on the application for production it is shown that the Court asked for and examined the files in the stockholders' derivative suit to see what issues were involved in it. At pages 134 to 142 of the same transcript the position of counsel for the defendants that no question of the right of George M. Bechtel as an officer and director to deal with the corporation was in issue, is discussed and acquiesced in by the court.

At the conclusion of arguments as to the materiality of certain records demanded the Court said:

"I don't think there is any fiduciary relation existing between George M. Bechtel and the State of Iowa * * * it has been my view right along that certain things that the stockholder can raise, where the duty goes to him as a fiduciary capacity, that the State cannot raise. There is another case pending here, being case No.

23507, *Des Moines Bank & Trust Co. vs. George M. Bechtel,* which is marked Exhibit 'A' on May 18, 1943, that the issues of violating the fiduciary capacity are being raised against the Bechtels in a derivative stockholder suit. I say this kindly, without any rancor, that counsel with zeal which I maybe would have used myself if I had been in their position, haven't always kept clear the issues in this case and the other case, and time and again there has been an attitude evidenced to get into evidence in this case that which to my mind is useful only in the other case, but counsel in their zeal are forgiven for that". (Trans. on Applic. for Prod., pp. 239-240).

From the foregoing it is quite clear that all questions of constructive fraud were involved in the stockholders' derivative suit and not in the case at bar. The record in this case is utterly silent as to negotiations which led to the approval of the plan for reclassification by the board of directors and its submission to the stockholders. At that time the preferred stockholders were represented on the board by four of the six members. The common stock was owned by Martha R. Bechtel. She was neither an officer nor a director. She was represented on the board by her husband George M. Bechtel and her son Harold R. Bechtel. There was no allegation and no evidence that there was any breach of duty by the directors. Furthermore the rule for which Respondents cite numerous cases at page 27 of their brief does not apply to such a situation. In negotiations for a voluntary reorganization every stockholder, whether he be a director or not is entitled to look after his own interest and to make the best bargain possible. Constructive fraud, such as would permit the corporation to rescind a transaction by which a director reaped a personal profit would not sustain a finding of fraud which would vitiate a plan of reclassification of shares submitted to and adopted by a majority of all classes of stock affected

by it. Much less would it justify the cancellation of shares received by one class of stockholders without restoring them to their former position and status. Nothing short of actual fraud in procuring the adoption of the plan could justify that.

The argument of want of consideration and that in which it is contended that the new common shares received by Martha R. Bechtel under the plan were void under the laws of Delaware are entirely inapplicable. The nature and legal effect of such reclassifications under Sec. 26 of the General Corporation Law of Delaware have already been pointed out. No question of consideration is involved. The corporation received the consideration when it issued the original shares. In this case it had, according to the trial court's findings, received money or property for every share of its original common and preferred stock. It had received for the Bechtel shares a million dollars in property appraised by the Iowa Executive Council. When this stock was converted or transmuted into the new common shares there was no occasion for any consideration moving to the corporation.

The cases cited by Respondents to support their contention that the new Bechtel shares were issued in violation of the constitution and laws of Delaware are not in point. They were not cases of reclassification of existing shares for which payment had theretofore been received but involved the original issuance of shares for which no payment was made, or for which worthless shares of another corporation were taken in payment.

When shares have been issued for adequate consideration they are capable of reclassification and conversion into shares with different characteristics without further payment of any kind. The question of value is purely one for determination by the stockholders affected by the plan. Where they choose to permit participation on the part of

holders whose shares are inferior to theirs there is no want of consideration. The plan, to be made effective, required a favorable vote of the common as well as the preferred stockholders. If consideration is involved at all it is found in the favorable votes which were necessary to permit the change.

REPLY TO POINT THREE.

This point is Respondent's only attempt to justify the lower court's holding that the new common stock derived from the old common under the plan of reclassification should be cancelled and that the holder should not be reinstated as a holder of the original common stock. Their theory is that this course was justified because the old stock was used as an instrument to perpetrate a fraud on the preferred stockholders. They cite two cases as sustaining their proposition of law. These are definitely not in point.

In the case of *Weir v. Day*, 57 Iowa 84, 10 N. W. 304 the plaintiff sought recovery of property which he had conveyed to the defendant for the purpose of defrauding his creditors. It was held that he was not entitled to recover it. This is not authority justifying a refusal to restore the *status quo* when partially setting aside a reclassification believed to have been unfair to one class of stockholders.

The case of *First Trust & Savings Bank v. Iowa Wisconsin Bridge Company* is not at all similar to the case at bar. The master and the district court found that the mortgage sought to be foreclosed was procured by fraud, in that certain of the obligations for which it was given had never actually existed. The Circuit Court of Appeals says (on page 424 of the N. W. opinion):

> "The Court found that Thompson deliberately planned to defraud the bridge company".

Also, in sustaining the district court in its refusal to require the bridge company to return shares of stock surrendered in exchange for bonds held invalid, the Court of Appeals pointed out that the action was not one for rescission on the ground of fraud, but was an action for affirmative equitable relief in which the fraud was pleaded only as a defense. (N. W. Rep. p. 428). It then says:

> "Where the defrauded party is suing to rescind he must do equity by restoring whatever he received from the wrongdoer, but when the wrongdoer as plaintiff is attempting to enforce the tainted contract he is turned out of court empty handed".

Any relief against the reclassification plan which the intervenors as stockholders might have been seeking in the case at bar is governed by the principles applicable to rescission. The Bechtels were not seeking affirmative relief to which a defense of fraud was interposed. If alleged unfairness of the reclassification plan was in the case at all it must have been asserted by the intervenors as a basis for finding the plan inoperative and cancelling its fruits in the hands of the Bechtels. This can only be done with a restoration of the *status quo* and the Iowa-Wisconsin Bridge case is not authority for the contrary.

REPLY TO POINT FOUR.

Respondents answer our contention that the laws of Delaware governed the reclassification of the shares of the corporate defendant with the contention that by applying for a permit to do business in Iowa as a foreign corporation the Iowa Southern Utilities Company of Delaware subjected itself to the laws of Iowa and that those laws controlled the reclassification.

It is not necessary for the purposes of this case to pursue this argument to its logical conclusion, which would be

violative of every principle of law governing corporations. This is unnecessary because, as heretofore pointed out, the laws of Iowa did not even purport to prohibit foreign corporations doing business in the state from making changes in their capital structure in accordance with their charters and the laws of the state of their incorporation.

Chapter 387 makes applicable to foreign corporations licensed to do business in Iowa certain sections applicable to domestic corporations in connection with the sale and issuance of their stock. For example, Sec. 8412 prohibits the issue of stock until the corporation has received the par value thereof. Sec. 8413 provides that "if it is proposed to pay for capital stock in property or any other thing than money" the corporation must apply to the executive council for leave to issue it for such consideration. The pleadings in this case charged that much of the stock, both common and preferred, was issued without payment of the full par value and that some of it was issued for property without executive council authorization. These allegations were the real gist of plaintiff's action and constituted the reason for the contention of the relator that the common and much of the preferred stock was void, in which the intervenors joined. The defendants, both corporate and individual, denied these allegations and most of the voluminous record was made in tracing out the details in connection with the issuance of each of the 90,000 shares of stock.

If plaintiff had succeeded in showing that the old common stock had not been properly paid for and the decree invalidating it had been based upon that violation of the Iowa Statutes, the question of the applicability of these Iowa statutes to foreign corporations would have been material. However, no such question is involved at present because the evidence established that every share of common and preferred stock issued by the Iowa Southern Utilities Com-

pany of Delaware was fully paid for in money or in property approved by the Executive Council. The Court so found (Findings d, Rec. p. 330; e, Rec. p. 331; f, Rec. p. 332; Concls. A and B, Rec. p. 348) and this renders any consideration of the matters argued in Point Four, immaterial.

Whether it could lawfully be required to do so or not, the Iowa Southern Utilities Company of Delaware did comply with the Iowa statutes in issuing its stock. Starting in 1923 when it first procured its permit to do business in Iowa as a foreign corporation, it applied to the Iowa Executive Council for authority to issue its common stock for property. (Finding d, Rec. p. 330). This and a subsequent application were granted and every share of the original common stock of which Martha R. Bechtel was the owner at the time of the reclassification had been issued in strict compliance with the statutes and laws of the State of Iowa. This being true, the question narrows down to whether the validity and effect of a reclassification of stock of a foreign corporation, authorized by its charter and the laws of the State under which it was created, is to be determined by the law of the domicilliary state. Stated, otherwise, the question is whether changes in the capital structure of a foreign corporation, which do not in any way violate any applicable provisions of the statutes of a state in which the corporation does business, are controlled by the charter and the laws of the state which created it, and whether those laws are entitled to full faith and credit under the Constitution.

REPLY TO POINT FIVE.

Point Five is closely related to Point Four, just discussed. Respondents' argument is that full faith and credit was not required to be given to the charter and Sec. 26 of the General Corporation Law of Delaware because the corporate defendant is not a citizen entitled to the benefit of the due

process clause, and because Iowa was not required to admit it to do business in the state. This begs the real question entirely. Whether it had the power to do so or not, the State of Iowa did not exclude the defendant corporation from the state. Neither did it impose any condition that it waive the right given by Section 26 of the General Corporation Law of Delaware to reclassify its shares. Any conditions imposed by the statutes of Iowa were fully complied with when it issued its stock. The reclassification was not prohibited by the laws of Iowa. Its legal effect as a transmutation of the shares was controlled by the Delaware Law. Iowa could not refuse to recognize the validity of the change. At most it could have revoked the permit to do business in the state, which the Court refused to do.

The question of due process does not involve the corporation but is asserted on behalf of the Petitioners who are citizens and entitled to the protection of that clause whether the corporation is or not.

REPLY TO POINT SIX.

So far as the argument of this point relates to whether the relative rights of stockholders were in issue or voluntarily litigated, the matter has been covered earlier. It has been shown that the trial court and the parties all proceeded throughout the trial on the theory that the only issues were whether there had been violations of the provisions of Chapter 387.

The essence of Petitioners' claim that they were denied due process and a fair opportunity to defend is that the court decided against them on an issue that was not in the case and was not voluntarily litigated and that it did so after repeatedly stating that that issue was involved in another action and not in this, and after the Intervenors had expressly denied that such issue was raised by them.

Respondents now contend that because two days elapsed

between the court's oral announcement and the filing of its findings of fact, conclusion of law and decree, the present Petitioners had full opportunity to defend on the issue. It is submitted that if the matter was not in issue or voluntarily litigated it was not incumbent upon the individual defendants to ask to reopen the case and litigate such issue. They had a perfect right to proceed by way of appeal and it is to be noted that the Supreme Court of Iowa did not purport to affirm because of any failure to ask a retrial.

They next contend that during the 30 days which elapsed before the appeal was perfected the individual defendants did not make any motion to set aside or modify any of the court's findings. This Court will not fail to note that in its formal findings the trial court did not include everything mentioned in the oral pronouncement. It is elementary that oral statements by the court form no part of the decision. The only formal finding of fact to support the conclusion that the new common stock derived by the Bechtels was void are the findings (aa Rec. p. 346, l. 30, and Finding v, Rec. p. 343) that the old common was worthless at the time of the reclassification, and that the plan was therefore inequitable. Being satisfied that such a finding could not, as a matter of law, sustain a decree of invalidity, the holders were not required to ask to set it aside.

The case cited by Respondents as to what is due process in the construction of state laws binding upon the parties, are not in point. The gist of Petitioners' claim in this respect is that courts of a state cannot declare black to be white, and while, this court cannot be called on to correct mere errors in the course of litigation in the state courts, it can protect a litigant against the loss of his property without an opportunity to defend.

CONCLUSION.

As stated at the beginning of this Reply, Respondents' brief in opposition to the petition for the writ hardly touches the fundamental question regarding the applicability and controlling force of the laws of Delaware, or the rights of stockholders of a Delaware corporation to insist upon recognition of the contract created by the charter and the laws of that state.

It is respectfully submitted that the Petition and brief in support thereof disclose a proper case for review by this Court, and that the brief in opposition does not by any means dispose of the Constitutional questions raised.

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